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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMAS OCHOA DELGADO,

Defendant and Appellant.

H027914

(Santa Clara County

Super. Ct. No. CC109377)

A jury convicted defendant Tomas Ochoa Delgado of resisting arrest, assault on a peace officer by means likely to produce great bodily injury, battery, and possession of a controlled substance. The trial court then found true allegations of four prior convictions for purposes of the Three Strikes law, three prior prison terms for purposes of one-year sentence enhancements, and four prior convictions for purposes of probation ineligibility. It sentenced defendant to 25 years to life for the resisting-arrest conviction, imposed stayed or concurrent terms on the remaining three convictions, and struck the prison-prior enhancements. On appeal, defendant contends that (1) the trial court erred by instructing the jury in the language of CALJIC No. 2.52 (flight indicating consciousness of guilt), and (2) his sentence constitutes cruel and unusual punishment. In a separate petition for writ of habeas corpus, which we ordered considered with the appeal, defendant raises a claim of ineffective assistance of counsel. We disagree with defendant and affirm the judgment. We also dispose of the habeas corpus petition by separate order filed this day.

BACKGROUND

San Jose Police Officer James Hussey effected a nighttime traffic stop because he believed that the automobile driver was intoxicated. Defendant, a parolee at large with an outstanding arrest warrant, exited from the driver's position and ran away at full speed into an apartment complex alleyway. Officer Hussey left his vehicle and pursued defendant. Defendant ignored Officer Hussey's admonitions to stop. He ran out of Officer Hussey's sight but fell down. Officer Hussey illuminated his flashlight and saw him lying on the ground. Defendant got up and continued running. At some point, he circled around a tree and ran back toward Officer Hussey. The two collided and fell on the ground. Officer Hussey got on top of defendant, but defendant grabbed Officer Hussey's neck and began choking him. Officer Hussey hit defendant in the head several times with his flashlight. Defendant released his grip and tried to escape by biting Officer Hussey's hand. Officer Hussey hit defendant several more times with the flashlight. Another officer arrived and assisted in placing handcuffs on defendant. This officer also searched defendant and found methamphetamine. An ambulance transported defendant to the hospital for treatment where defendant's blood tested positively for methamphetamine and amphetamine. Officer Hussey also received treatment at the hospital. Officer Bruce Alexander relieved Officer Hussey and escorted defendant to his vehicle. As he freed a hand to unlock the car, defendant ran away through the parking lot. At some point, defendant stopped and submitted to custody.

At sentencing, defendant moved to strike his prior convictions and reduce the controlled-substance conviction to a misdemeanor. In denying the former motion after granting the latter motion, the trial court articulated the following: "But I don't think with respect to [resisting arrest and assault on a peace officer] that is too serious--those charges are just way too serious. [¶] So we have a situation where the charges, in my view, are very serious, where the history is 19 years of criminal justice--not government--but criminal justice supervision. [¶] Defendant has been in and out of custody. He's got

four strikes. The most recent is 1999. You know, there doesn't seem to be much room here. I mean, he does--I acknowledge he has a loving and supportive--and supportive family. But that is only part of the equation. [¶] He has eight felonies, eleven misdemeanors.^[1] It's just--it's just an atrocious record. And it's not one that I believe justifies taking the defendant outside the Three Strikes law."

CALJIC NO. 2.52

The trial court instructed the jury as follows: "The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt but is a fact which, if proved, may be considered by you in the light of all the other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

Defendant contends that the trial court erred by giving this instruction because no evidence supported it. He claims that his flight from Officer Hussey at the scene does not justify the instruction because it occurred before he committed any of the charged offenses; and he asserts that his flight from Officer Alexander does not justify the instruction because it occurred after he was arrested.

Assuming that defendant preserved this issue despite failing to object,² we disagree with defendant's contention.

" 'An instruction on flight is properly given if the jury could reasonably infer that the defendant's flight reflected consciousness of guilt, and flight requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.' [Citation.]" (*People v. Visciotti* (1992) 2 Cal.4th 1, 60, quoting *People v. Crandell*

¹ The probation report indicates that defendant has 20 misdemeanor convictions, 11 of which were drug-related.

² The People argue that any challenge to the flight instruction was waived by defendant's failure to object.

(1988) 46 Cal.3d 833, 869.) The flight instruction “neither requires knowledge on a defendant’s part that criminal charges have been filed, nor a defined temporal period within which the flight must be commenced, nor resistance upon arrest.” (*People v. Carter* (2005) 36 Cal.4th 1114, 1182.)

Defendant simply overlooks that the evidence of his flight from the scene reflected a consciousness of guilt and a purpose to avoid arrest for possession of a controlled substance (methamphetamine), which was the fourth of the charged offenses. He tacitly acknowledges this in his reply brief and counters that the trial court should have instructed sua sponte that the flight instruction applied only to the controlled-substance count. There is no merit to this claim because defendant did not proffer a proposed modification of the instruction to obviate the purported infirmity about which he now complains. When a proposed instruction correctly states the general principle of law applicable to the case, but the defendant believes it is misleading or confusing under the specific facts of the case, clarifying language must be proffered. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1191-1192.) Failure to do so precludes a claim on appeal that the trial court’s failure to expand, modify or refine standardized instructions provides grounds for reversal. (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

Defendant also argues that CALJIC No. 2.52 improperly reduces the prosecution’s burden of proof because it advises the jury that it may consider flight in the light of all the other proved facts in deciding guilt. But defendant cites no authority for this proposition. And he fails to acknowledge Supreme Court precedent to the contrary. The most recent precedent succinctly concludes that the instruction is proper and does not lessen the prosecution’s burden of proof. (*People v. Boyette* (2002) 29 Cal.4th 381, 438-439.)

CRUEL AND UNUSUAL PUNISHMENT

Defendant contends that his sentence constitutes cruel and unusual punishment under the federal and state Constitutions. (U.S. Const., Eighth Amend.; Cal. Const., art.

I, § 17.) He notes that “the issue in this case is whether, considering the current offense, the prior strikes and the nature and character of the defendant, the sentence is outside the spirit of the maximum sentence the three strikes scheme permits.” He claims that he was a model inmate in jail and loving and caring toward his family. He adds that the sentence is effectively a life sentence given that he will be 60 years old before he is eligible for parole and, in any event, parole is unlikely given the history of the Parole Board and Governor.

A punishment is excessive under the Eighth Amendment if it involves the “unnecessary and wanton infliction of pain” or if it is “grossly out of proportion to the severity of the crime.” (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) A punishment may violate article I, section 17 of the California Constitution if “it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

As defendant implicitly acknowledges, his lengthy sentence cannot be viewed just as punishment for the instant offenses; it was punishment for committing a felony and doing so as a recidivist offender. In other words, defendant “was punished not just for his current offense but for his recidivism. Recidivism justifies the imposition of longer sentences for subsequent offenses.” (*People v. Cooper* (1996) 43 Cal.App.4th 815, 825.)

In *Rummel v. Estelle* (1980) 445 U.S. 263, 284-285, the United States Supreme Court explained that society is warranted in imposing increasingly severe penalties on those who repeatedly commit felonies. In that case, the defendant was given a mandatory life sentence for stealing \$120.75 and having prior convictions for fraud involving \$80 worth of goods and passing a forged check for \$28.36. (*Id.* at p. 265.) The court rejected the defendant’s claim that his sentence was disproportionate to the severity of his current offense. The court pointed out that the primary goals of a recidivist statute are to “deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest

of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. . . . [T]he point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Id.* at pp. 284-285.)

More recently, in *Lockyer v. Andrade* (2003) 538 U.S. 63, the court rejected a similar claim. There, the defendant stole \$153.54 worth of videotapes from two stores on separate occasions. A jury convicted him of two counts of petty theft with a prior and found that he had at least two prior strike convictions. The court sentenced him under the Three Strikes law to two consecutive life terms. The record revealed the following: in 1982, the defendant suffered a state misdemeanor theft conviction and a few felony burglary convictions; in 1988, the defendant suffered a federal conviction for transporting marijuana; in 1990, the defendant suffered a state misdemeanor petty theft conviction and a second federal conviction for transporting drugs; in 1991, the defendant was arrested for a state parole violation--escape from federal prison; in 1993, the defendant was released on parole; and, in 1995, the defendant committed the two current offenses. Given these circumstances, the court did not find the defendant's two life terms to be unconstitutional.

In *Ewing v. California* (2003) 538 U.S. 11, the defendant was convicted of grand theft--he stole three golf clubs worth \$399 each. Under the Three Strikes law, the trial court imposed a life term. The record revealed that the defendant's criminal history spanned from 1984 to 1999 and included misdemeanor and felony convictions for petty theft, auto theft, battery, burglary, robbery, possession of drugs, trespass, and unlawful possession of a firearm. There too, the court did not find the defendant's sentence to be unconstitutional.

Defendant's sentence and circumstances are not distinguishable from those in these cases and do not suggest that his punishment is unconstitutional. (Cf. also *Harmelin v. Michigan* (1991) 501 U.S. 957 [life without possibility of parole for possession of drugs]; *People v. Poslof* (2005) 126 Cal.App.4th 92 [three-strike life term for failing to register as sex offender not unconstitutional]; *People v. Cline* (1998) 60 Cal.App.4th 1327 [life term for grand theft and residential burglary with prior residential burglary convictions].)

Defendant's reliance on *People v. Carmony* (2005) 127 Cal.App.4th 1066 is erroneous.

In *Carmony*, the defendant, a sex offender, registered his correct address with police one month before his birthday, as required by law, but failed to update his registration with the same information within five working days of his birthday. (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1071.) He later pleaded guilty to failing to register as a sex offender and admitted three prior serious or violent felony convictions. (*Ibid.*) He was sentenced to a three-strike term of 25 years to life. On appeal, the court deemed the sentence unconstitutional. In reaching its conclusion, the court noted that the defendant's current offense involved a passive omission and "no more than a harmless technical violation of a regulatory law." (*Id.* at pp. 1072, 1077.) Moreover, the court pointed out that the registration requirement was designed to ensure that law enforcement authorities could readily conduct surveillance of sex offenders. However, in the defendant's case, "there was no new information to update and the state was aware of that fact. Accordingly, the requirement that defendant reregister within five days of his birthday served no stated or rational purpose of the registration law." (*Id.* at p. 1073.)

Here, defendant's offenses are not harmless technical violations of a regulatory law, as defendant concedes. And they are unquestionably more serious than the offense in *Carmony* and even those in *Rummel*, *Andrade*, and *Ewing*.

When considered with defendant's lengthy, serious record, the assertion that defendant's sentence is cruel and unusual rings hollow. Defendant cites no case holding that such a sentence, given such a record, is unconstitutional. In sum, we do not find that defendant's sentence qualifies as cruel and unusual punishment under the federal or state Constitutions.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.